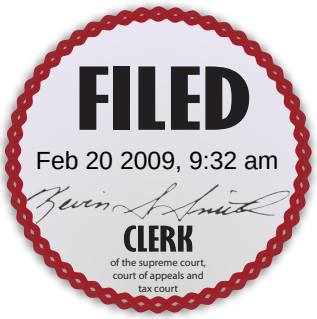

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IN THE COURT OF APPEALS OF INDIANA

BARRY SLACK, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0806-CR-286
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-0712-FB-103

February 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Barry Slack, Jr. was convicted, pursuant to a guilty plea, of Class B felony Sexual Misconduct with a Minor[1] and found to be a Habitual Offender,[2] after which the trial court sentenced him to serve an aggregate twenty-six year sentence, with twenty-five years executed in the Department of Correction. Upon appeal, Slack argues that the trial court abused its discretion in considering his criminal history to be an aggravating circumstance. We affirm.

FACTS AND PROCEDURAL HISTORY

According to the stipulated factual basis entered at the time of the guilty plea hearing, on December 1, 2007, Slack, who was at T.A.'s home in Gary, called T.A. into the bedroom he shared with T.A.'s mother. Slack was thirty-seven years old at the time, and he knew that T.A. was at least fourteen years of age but not older than sixteen years of age. Slack asked T.A. to do him the "favor" of performing oral sex on him, and T.A. complied. Tr. p. 10-11.

On December 3, 2007, the State charged Slack with Class B felony Sexual Misconduct with a Minor. On January 7, 2008, the State filed an amended information alleging, in addition to the sexual misconduct charge, that Slack was a habitual offender.[3]

On March 20, 2008, Slack pled guilty, pursuant to a plea agreement, to the sexual misconduct charge, and he admitted to being a habitual offender. At the plea hearing,

[1] Ind. Code § 35-42-4-9 (2007).

[2] Ind. Code § 35-50-2-8 (2007).

[3] This amended information was not included in the record.

Slack admitted to prior convictions in 1991 for Class D felonies attempted auto theft and auto theft, and to a 2003 conviction for Class C felony burglary. Following a May 7, 2008 hearing, the trial court entered judgment of conviction against Slack for sexual misconduct with a minor and found him to be a habitual offender.

Upon sentencing Slack, the trial court found as a mitigating circumstance the fact that Slack had pled guilty and accepted responsibility for his crime, saving the State and its witnesses the resources required for trial. The trial court found as aggravating circumstances Slack's criminal history, including his 1991 auto theft and attempted auto theft convictions and his 2003 burglary conviction,[4] as well as his convictions in 2007 for Class B misdemeanor failure to stop after an accident resulting in non-vehicle damage and Class A misdemeanor conversion, and the fact that he was on probation at the time of the instant offense. In addition, the trial court found as aggravating circumstances the facts that T.A. had a mild mental disability and that Slack had violated his position of having care, custody, or control of T.A. in committing the instant crime.

The trial court concluded that the aggravating factors substantially outweighed the mitigating factor and imposed a fifteen-year sentence in the Department of Correction for Slack's sexual misconduct with a minor conviction. Based upon Slack's habitual offender status, the trial court enhanced his fifteen-year sentence by eleven years, with

[4] Slack's 1991 auto theft and attempted auto theft convictions and his 2003 burglary conviction were used to establish his habitual offender finding and also to establish the aggravating circumstance of criminal history for purposes of imposing his sentence. This does not constitute impermissible double enhancement. *Pedraza v. State*, 887 N.E.2d 77, 80 (Ind. 2008) ("[W]hen a trial court uses the same criminal history as an aggravator and as support for a habitual offender finding, it does not constitute impermissible double enhancement of the offender's sentence.").

ten of those years executed and one suspended to probation, for a total executed sentence of twenty-five years followed by one year of probation. In addition, the trial court ordered Slack, upon his release, to register as a sex offender. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Slack claims that the trial court abused its discretion in considering his criminal history as an aggravator. According to Slack, "[T]wo felony convictions, the last conviction which occurred four years prior to the date of the offense in this case[,] do[] not constitute a history of criminal convictions and a finding of an aggravating circumstance." Appellant's Br. p. 5. Slack offers no authority for this position.

I. Standard of Review

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). In *Anglemyer*, the Supreme Court held that Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Id.* at 490. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id*. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.* A trial court may abuse its discretion if it fails to enter a sentencing statement at all. *Id.* A trial court may also abuse its discretion if it explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing

statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. *Id.* at 490-91. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record. *Id*. at 491.

II. Analysis

We are somewhat baffled by Slack's claim that the trial court abused its discretion in considering his prior crimes, which Slack apparently argues were too few and far removed to constitute a "valid" criminal history. Even if criminal history is minimal or remote in time, the trial court is still entitled to consider it as an aggravating circumstance. *See Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002) ("The remoteness of prior criminal history does not preclude the trial court from considering it as an aggravating circumstance.") Here, however, Slack's criminal history was neither minimal nor remote. The pre-sentence investigation report, which Slack did not contest, reveals that he has no fewer than *five* prior convictions, the most recent of which occurred *less than a year* prior to the instant offense. These past convictions include Class D felony auto theft and Class D felony attempted auto theft in 1991; Class C felony burglary in 2003; and Class B misdemeanor failure to stop after an accident and Class A misdemeanor conversion in 2007. Significantly, Slack was still on probation for his 2007 offenses at the time of the instant offense. The trial court did not abuse its discretion in considering Slack's criminal history to be an aggravating circumstance. *See* Ind. Code §

35-38-1-7.1(a)(2) (2007) (permitting the trial court to consider a person's "history of criminal or delinquent behavior" as an aggravating circumstance).

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and MAY, J., concur.